



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 10, 1997

The Honorable Bill M. Reimer
Comal County Attorney
150 North Seguin, Suite 318
New Braunfels, Texas 78130

Letter Opinion No. 97-036

Re: Whether a marina may avoid the tax imposed on the rental of water-oriented recreational equipment by section 324.099 of the Local Government Code by reorganizing as a private club (ID# 25951)

Dear Mr. Reimer:

On behalf of the Comal County Water Oriented Recreation District (the "district"), your predecessor in office asked whether a marina may avoid the tax imposed on the rental of water-oriented recreational equipment by section 324.099 of the Local Government Code by reorganizing as a private club. Chapter 324 of the Local Government Code authorizes a county that has river frontage on certain rivers to create a park and recreation district. Section 324.099 provides in pertinent part:

(a) The district may levy and collect taxes and issue revenue permits to carry out any purposes prescribed by this chapter and to pay the obligations of the district.

(b) The taxes that a district may levy apply only within the district and are:

....

(3) a tax imposed by resolution of the board at a rate not greater than five percent on the price paid for recreational guide or shuttle services or on the *rental of any parking space and any water-oriented recreational equipment*, including a canoe, tube, raft, *boat*, or sailing craft intended for use on public inland water in the district; boat slips, fishing tackle; and life jackets. [Emphasis added.]

Subsection (d) of section 324.099 provides that a person who does not hold a district revenue permit may not provide for or offer for remuneration a service, use of a facility, or a rental of an item if the price paid for the service, use, or rental is taxed under this section and requires a person who holds a revenue permit to collect taxes imposed under this section. Local Gov't Code § 324.099(d). Violation of subsection (d) is punishable as a criminal offense. *Id.* § 324.099(h).

A marina located in the district has been organized as a private club. Your predecessor described the arrangement as follows: "The members will pay an initiation fee to join the club and will thereafter pay monthly membership dues. Each member will have the right to the use and enjoyment of boats and boating equipment owned by [the business]." The marina contends that the district may not tax the initiation fees or monthly membership fees. The district takes the position that these transactions are taxable under section 324.099.

A taxing statute must be construed strictly against the taxing authority and liberally in favor of the person or entity sought to be held. *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166, 169 (Tex. 1977). A similar rule of construction applies to criminal and other penal statutes. See, e.g., *Carbide Intern., Ltd. v. State*, 695 S.W.2d 653, 658-59 (Tex. App.--Austin 1985, no writ) (citing cases).

Chapter 324 does not define the term "rental" nor are we aware of any Texas case defining the term in an analogous context. We define the term according to its common usage. See Gov't Code § 311.011. "Rental" in section 324.099(b)(3) is used as a noun; it appears to refer to an amount paid or collected as rent.¹ "Rent" is a sum paid for the use and possession of property.²

Based on these definitions, we believe that the term "rental" in section 324.099 must be construed to mean amounts paid in exchange for the use and possession of property or equipment. We believe that a court would look beyond the form of the members' transactions with the marina to determine whether the initiation fees and monthly membership fees are, in essence, amounts paid in exchange for no more than the use and possession of property or equipment. See, e.g., *Statistical Tabulating Corp.*, 549 S.W.2d at 167 (applying essence or object of transaction test to determine if transaction subject to sales tax); *Bullock v. Citizens National Bank of Waco*, 663 S.W.2d 923, 924 (Tex. App.--Austin, 1984, no writ) (looking beyond form of transaction to determine whether transaction involved lease subject to sales tax or if lease was merely security device for financing arrangement).

Thus, whether the initiation fees and monthly membership fees are taxable rental payments under section 324.099 will depend upon whether the fees are paid in exchange for the use of property and equipment that is taxable under the statute. The resolution of this question depends upon the consideration that the members receive in exchange for paying the fees. If members pay the fees in exchange for the right to use taxable property

¹See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 998 (1990) (defining the noun "rental" first as "an amount paid or collected as rent").

²See *id.* (first definition of the noun "rent"); see also BLACK'S LAW DICTIONARY 1166 (5th ed. 1979) (defining the term "rent" as "the compensation or fee paid, usually periodically, for the use of any property, land, buildings, equipment, etc.").

and equipment, such as the marina's boats and boating accessories and boating equipment, then we believe that the fees may be properly characterized as rental payments. On the other hand, if members pay the fees not just for the right to use taxable property and equipment but also for other significant consideration, the fees are not taxable rental payments.

A court required to determine whether a fee is a taxable rental payment under section 324.099 would review membership agreements and any other agreements between the marina and its members. It would also review other evidence regarding the consideration members receive in exchange for fees paid to the marina. If a court were to find that members receive no consideration other than the right to use marina property and equipment, we do not believe the court would permit a marina to avoid the tax simply by reorganizing as a private club and calling the fees something other than rental payments. On the other hand, given the rule of strict statutory construction applicable to tax and penal statutes, we believe that a court would not find initiation fees and monthly membership fees taxable under section 324.099 if it determined that members receive significant consideration³ in addition to the right to use the marina's property and equipment. This office is not a fact-finding body.⁴ Furthermore, because contract construction often requires findings of fact, we generally refrain from interpreting contracts in the opinion process.⁵ Given these limitations, we are unable to definitively determine whether fees at issue are taxable rental payments.

³The determination whether other consideration is significant or *de minimis* would itself require the resolution of factual issues. See *infra* note 4.

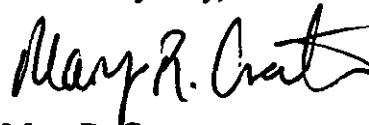
⁴See, e.g., Attorney General Opinions DM-383 at 2 (questions of fact are inappropriate for opinion process), DM-98 (1992) at 3 (questions of fact cannot be resolved in opinion process), H-56 (1973) at 3 (improper for attorney general to pass judgment on matter that would be question for jury determination), M-187 (1968) at 3 (attorney general cannot make factual findings).

⁵See, e.g., Attorney General Opinions DM-383 at 2 (interpretation of contract not appropriate function for opinion process), DM-192 (1992) at 10 ("This office, in the exercise of its authority to issue legal opinions, does not construe contracts."), JM-697 (1987) at 6 ("review of contracts is not an appropriate function for the opinion process"). In accordance with our general practice, we refrain from construing or commenting on the membership agreement submitted with your request.

S U M M A R Y

A marina may not avoid the tax imposed on the rental of water-oriented recreational equipment by section 324.099 of the Local Government Code by reorganizing as a private club if members pay initiation fees and monthly membership fees in exchange for the right to use the marina's boats and boating accessories and equipment and receive no other consideration in exchange for the payment of these fees.

Yours very truly,

A handwritten signature in black ink, appearing to read "Mary R. Crouter". The signature is fluid and cursive, with a large, stylized initial "M".

Mary R. Crouter
Assistant Attorney General
Opinion Committee